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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON DANIEL BURHENN,

Defendant and Appellant.

F058497

(Super. Ct. No. MF008627B)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Cory J. Woodward, Judge.

Paul R. Kraus, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Cornell, J., and Dawson, J.

It was alleged by information filed May 18, 2009,<sup>1</sup> that appellant, Jason Daniel Burhenn, committed second degree burglary (Pen. Code, §§ 459, 460, subd. (b)),<sup>2</sup> had suffered a “strike,”<sup>3</sup> and had served a prior prison term for a prior felony conviction (§ 667.5, subd. (b)).

On April 2, appellant filed a motion to strike the strike allegation. On April 23, the court denied the motion.

On July 23, appellant, pursuant to a plea agreement, pled no contest to the burglary charge and admitted the strike allegation, and the court granted the prosecution’s motion to dismiss the prior prison term enhancement.

One of the terms of the plea agreement was that the maximum sentence appellant would receive would be four years. On August 20, the court imposed a prison term of four years, consisting of the two-year midterm on the substantive offense, doubled pursuant to the three strikes law (§§ 667, subd. (e)(1); 1170.12, subd. (c)(1)).

Appellant did not request, and the court did not issue, a certificate of probable cause (§ 1237.5).

Appellant’s appointed appellate counsel has filed an opening brief which summarizes the pertinent facts, with citations to the record, raises no issues, and asks that this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d. 436.) Appellant himself has filed a brief in which he argues he was denied his constitutional right to the effective assistance of counsel. We will affirm.

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<sup>1</sup> All references to dates of events are to dates in 2009.

<sup>2</sup> All statutory references are to the Penal Code.

<sup>3</sup> We use the term “strike” as a synonym for “prior felony conviction” within the meaning of the “three strikes” law (§§ 667, subds. (b)-(i); 1170.12), i.e., a prior felony conviction or juvenile adjudication that subjects a defendant to the increased punishment specified in the three strikes law.

## FACTUAL AND PROCEDURAL BACKGROUND

### *Facts*<sup>4</sup>

On February 17, Kern County Deputy Sheriff William Hull, responding to a report of a burglary, went to an office supply store in Tehachapi (the store) and found the front glass door was shattered and a cement block was lying on the floor inside the store. The deputy made contact with the owner of the store, who stated that two coin-operated vending machines – a gumball machine and a sticker tattoo machine – were missing. On February 19, Kern County Deputy Sheriff Joshua Nicholson spoke with Justin Cobb, who stated that he and another person had committed the burglary at the store. Deputy Nicholson later recovered the stolen vending machines; they had been destroyed.

Also on February 19, Deputy Nicholson spoke with appellant. Appellant stated he had assisted in the burglary of the store.

### *Procedural Background*

At the close of the sentencing hearing, appellant's counsel stated the following: "[Y]our Honor my client just handed me something so I'll put on the record for appeal purposes and that's Rule 3-310 of the California Rules of Professional Conduct, where I have to divulge to him any actual or recently foreseeable adverse effects of conflict of interest.<sup>[5]</sup> [¶] I did tell him while this case was pending that my firm does do business with [the store]. I can honestly say I don't know the owner. I wouldn't know him if I

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<sup>4</sup> Our factual summary is taken from the transcript of appellant's preliminary hearing.

<sup>5</sup> State Bar Rules of Professional Conduct, rule 3-310, provides, in relevant part: "(B) A member [of the California State Bar] shall not accept or continue representation of a client without providing written disclosure to the client where: [¶] (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter ...."

saw him. I simply do business with [the store]. [¶] It has not affected me in any way in my representation of [appellant].”

## **DISCUSSION**

Appellant contends he was denied his constitutional rights to the effective assistance of counsel and “Conflict Free Representation” because, he asserts, his trial counsel: had a legal, business, and financial relationship with the store; “kept this [relationship] a secret” from appellant; “did not have [appellant] sign a waiver”; failed to move for an order reducing the instant offense to a misdemeanor; failed to submit “character references” to the sentencing court; “made no effort on [appellant’s] behalf to act as competent counsel”; and acted for the benefit of the store rather than appellant. There is no merit to these contentions.

“Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel ....” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To establish constitutionally ineffective assistance of counsel, “a defendant must show both that his counsel’s performance was deficient when measured against the standard of a reasonably competent attorney and that counsel’s deficient performance resulted in prejudice to defendant ....” (*People v. Lewis* (2001) 25 Cal.4th 610, 674.) “[T]his court is, of course, limited to the record on appeal and may not speculate about matters outside that record.” (*People v. Moreno* (1987) 188 Cal.App.3d 1179, 1185.)

A criminal defendant’s constitutional right to the assistance of counsel “includes the correlative right to representation free from any conflict of interest that undermines counsel’s loyalty to his or her client.” (*People v. Doolin* (2009) 45 Cal.4th 390, 417.) Conflicts of interest “““embrace all situations in which an attorney’s loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.”” [Citation.] [¶] Under the federal Constitution, when

counsel suffers from an actual conflict of interest, prejudice is presumed. [Citation.] This presumption arises, however, ‘only if the defendant demonstrates that counsel “actively represented conflicting interests” and that “an actual conflict of interest adversely affected his lawyer’s performance.”’ [Citations.] An actual conflict of interest means ‘a conflict that affected counsel’s performance—as opposed to a mere theoretical division of loyalties.’ [Citation.]” (*People v. Roldan* (2005) 35 Cal.4th 646, 673, italics omitted.)

In attempting to establish ineffective assistance of counsel on a conflict-of-interest theory, appellant demonstrates, at most, a mere theoretical division of loyalties. He has not demonstrated that his counsel’s relationship with the store affected counsel’s performance. And, appellant’s other complaints about counsel’s representation are stated in conclusory fashion and/or are not supported by the record. Therefore, as to these complaints, appellant has established neither deficient performance nor prejudice. Accordingly, appellant’s claim of ineffective assistance of counsel fails.

Following independent review of the record, we have concluded that no reasonably arguable legal or factual issues exist.

#### **DISPOSITION**

The judgment is affirmed.